IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

MONDAY, THE 13TH NOVEMBER 2006 / 22ND KARTHIKA 1928

RSA.No. 549 of 2006()

AS.307/2004 of VI ADDL.DISTRICT COURT, ERNAKULAM
OS.250/1982 of I ADDL.SUB COURT,ERNAKULAM

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APPELLANTS:-APPELLANTS/5TH DFNDTS./LRS.OF 2ND DEFT

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1. K.C. JOSEPH, S/O. LATE SOURI,
   AGED 73 YARS, KOTTAPARAMBIL, KATHRIKADAVU,
   ELAMKULAM VILLAGE, KANAYANNOOR TALUK.

2. THANKACHAN, AGED 41 YEARS,
   S/O. DECEASED MATHEW KOTTEPARAMBIL,
   KATHRIKKADAVU DESOM, ELAMKULAM VILLAGE,
   KANAYANNOOR TALUK.

BY ADV. SMT.RAMEENA.P.K.
SRI.SUNIL V.MOHAMMED

RESPONDENTS: RESPONDENTS/PLNTF.& CR.PTNRS/L.RS. OF D1 TO 3,4:

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1. THRESIA, D/O. SOURI,
   KOTTAPPARAMBIL AND W/O. K.K. JOSEPH, RESIDING AT
   KOIKKARANPARAMBIL, PERUMANOOR DESOM,
   ERNAKULAM VILLAGE, KANAYANNOOR TALUK.

2. THRESIA, AGED ABOUT79 YEARS,
   W/O. DECEASED PETER KOTTAPARAMBIL,
   KATHRIKKADAVU DESOM, ELAMKULAM VILLAGE,
   KANAYANNOOR TALUK.

3. XAVIER, AGED ABOUT 52 YEARS,
   S/O. PETER -DO- -DO-.

4. MAGGI, AGED ABOUT 40 YEARS,
   S/O. PETER -DO- -DO-.

5. ANTAPPAN, AGED ABOUT 34 YEARS,
   S/O. PETER -DO- -DO-.

6. RENNY, AGED ABOUT 32 YEARS,
   D/O. PETER -DO- -DO-.

7. BENCHAMIN, AGED ABOUT 30 YEARS,
S/O. PETER -DO- -DO-.

8. BEENA, AGED ABOUT 36 YEARS,
D/O. PETER AND W/O. JOSEPH, AZHEEKKAL HOUSE,
CHITTOOR ROAD, KOCHI-682 027.

9. ELIZABETH JOHN, AGED ABOUT 47 YEARS,
D/O. PETER AND W/O. JOHN, ATHIPOZHY HOUSE,
BEACH ROAD, MOOLAMKUZHY, KOCHI-682 002.

10. CARMALI, AGED ABOUT 75 YEARS,
W/O. DECEASED MATHAI, KOTTEPARAMBIL,
KATHRIKADAVU DESOM, ELAMKULAM VILLAGE,
KANAYANNOOR TALUK.

11. XAVIER, AGED ABOUT 43 YEARS,
S/O. DECEASED MATHEW -DO- -DO-.

12. NORBIN, AGED ABOUT 36,
S/O.DECEASED MATHEW OF .DO. .DO.

13. BETTY, AGED ABOUT 55,
W/O.GEORGE, DO. .DO.

14. BIJU ANTONY, AGED ABOUT 27,
S/O.GEORGE, .DO. .DO.

15. BIJUMON, AGED ABOUT 23, S/O.GEORGE
KOTTAPARAMBIL, .DO. .DO.

16. KALA AGED ABOUT 25, D/O.GEORGE AND
W/O.SAJU, PALAPARAMBIL HOUSE,
GANDHI NAGAR, KOCHI 682017.

17. RAPHEL AGED ABOUT 65, S/O.SOURI,
KOTTEPARAMBIL, KATHRUKKADAVU,
ERNAKULAM VILLAGE, KANAYANNOOR TALUK.

R1 BY ADV. SRI.T.V.ANANTHAN
SRI.C.D.JOSE
R2 TO R11, R13 TO R15 BY SRI.T.U.ZIYAD

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 13/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN, J

R.S.A.No.549 OF 2006

Dated this the 13th day of November, 2006

JUDGMENT

This second appeal by the heirs of the second defendant in a suit for partition of the estate of an intestate Christian, is against the confirmation of the final decree.

2. During the pendency of the first appeal from the preliminary decree, at the instance of the plaintiff, on the strength of the decision of the Apex Court in **Mary Roy**'s case, the preliminary decree was modified and the plaintiff was found entitled to 1/6th share in the property. In the final decree proceedings, relying on the commissioner's report, it was held that she is entitled to plot Nos.1 and 2, having an extent of 9.003 cents, valued at Rs.25,000/- per cent. Before the trial court, the dispute between the parties during the final decree proceedings, after the receipt of the commissioner's report, was as to the correctness of the report determining the right over a way, having a width of 3.5 meters. The trial court, while passing

the final decree, confined the width of the passage to 3 meters.

3. In the appeal by the heirs of the second defendant, the lower appellate court found absolutely no material to be persuaded to hold against the granting of the right of way or passage with a width of 3m. On the basis of the materials on record, the lower appellate court modified the final decree, holding that the entitlements of the plaintiff will be only to 8.533 cents, which is plot No.1 and that she will not be entitled to plot No.2. The allotment of plot No.1 exclusively to the plaintiff was reasoned by fixing its valuation having regard to the crucial fact that it was the last among the plots, away from the main road while the contesting defendants have plots abutting the main road. It also affirmed the right of the plaintiff to access to plot No.1 from the Elamkulam-Kaloor road, the common passage as provided in Ext.C1(a), which shall be extended to plot No.1, through plot Nos.2 and 3. The final decree passed by the trial court stood confirmed, subject to such modification.

4. Before me, learned counsel for the appellant, the heirs of the second defendant, urged that the finding that the width of the way is 3m is quite unsustainable, in as much as, the width available is much less. It was also urged that the impugned decree, if executed, will result in demolition of some portion of the building belonging to the appellants.

5. In this second appeal, which could necessarily stand only on a substantial question of law in terms of Section 100 of the Code of Civil Procedure, to repel the arguments of the appellants, it is sufficient for me to quote the following from paragraph (7) of the judgment of the lower appellate court.

> "..... The next contention raised was that by providing 3 meter width passage an shown in Ext.C1(a) the buildings constructed in the property will have to be demolished. This fact was not proved before the lower court. At the time of arguments also the counsel for the appellants was not able to substantiate that any buildings are to be demolished. If 3 meter wide passage can be provided without demolishing structures it can be worked out at the time of execution proceedings. If way cannot be demarcated, without demolishing

> structures demolition of structures can be done, at the execution side, bearing in mind to cause less hardship to the appellants."

In view of what is stated above, I do not find any substantial question of law arising for decision in this second appeal. It fails and is accordingly dismissed. No costs.

THOTTATHIL B.RADHAKRISHNAN
Judge

kkb.